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Before the
Federal Communications Commission
Washington, DC 20554

ACCEPTED/FILED

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Federal Communications Commission
Office of the Secretary

In the Matter of:

CLOSED CAPTIONING et al.

) CGB-CC-0949

)

La Santa Misa ("SUNDAY MASS") of the
San Fernando Cathedral of San Antonio, TX

) Docket No. 06-181

To: Secretary

Attn: Suzy Rosen Singleton, Disability Rights Office, Room 3-C438
Consumer & Governmental Affairs Bureau

RESPONSE AND FURTHER SUPPLEMENT TO PETITION

The San Fernando Cathedral of San Antonio, TX ("SFC") submits this **RESPONSE AND FURTHER SUPPLEMENT** to its 2009 Petition for Exemption and/or Waiver ("Petition"), in specific response to the FCC staff's November 5, 2013 letter to SFC's FCC counsel ("Letter").¹ SFC's longstanding Petition broadly seeks administrative relief for its weekly Sunday Mass telecast ("Sunday Mass") from the FCC's closed captioning rules and policies.

While SFC's 2009 Petition and also its July 5, 2012 Supplement each cited several bases upon which the FCC should grant administrative relief for SFC's telecast of its Sunday Mass,² SFC's threshold argument was and remains that *any* FCC mandate, on *any* basis, that would

¹ The "Request for Supplemental Information" stated that, in order to "complete its consideration" of SFC's Petition, SFC should submit "additional and updated information." See Letter at 1.

² In SFC's 2012 "Supplement," the constitutional argument was raised first, followed by arguments (i) that forcing SFC to cancel the Sunday Mass telecast (because SFC cannot support higher deficits that closed captioning would produce) would defeat Congressional intent, as expressed in 47 CFR 79.1(d), that no closed captioning requirement should result in a *reduction* in local programming; (ii) that the Sunday Mass telecast constitutes programming that is entitled to a Categorical Exemption; (iii) that the Sunday Mass telecast is entitled to an Individual Exemption; and (iv) that the Sunday Mass telecast is entitled to a waiver of the FCC's closed captioning rules.

require SFC to alter the visual presentation of its Sunday Mass telecast – such as requiring closed captioning -- would violate SFC's first amendment rights to religious freedom.³

The Letter gratuitously and tersely purports to dismiss the threshold constitutional issue raised by SFC.⁴ It then it pivots solely to request additional (and intrusively private) financial information from the SFC, in order to “complete its consideration” of SFC's Petition on the only issue that the staff argues is pending before the agency – namely, “whether you [SFC] have made the showing required to warrant such an exemption,” i.e., whether an FCC's mandate requiring closed captioning of the Sunday Mass would be “economically burdensome” to SFC under 47 CFR 79.1(f). See Letter, at 1-2.⁵

The constitutional issue is the threshold question in this case. The FCC staff fails to seriously evaluate the manifest First Amendment implications that naturally would arise in any attempt by the FCC to force the alteration of any religious programming. The constitutional implications are magnified when, as here, the FCC attempts to force the alteration of a longstanding, sacred liturgical weekly observance, such as the telecast of the SFC's weekly Sunday Mass. The FCC staff's cursory dismissal of this issue reasonably requires supplemental information.

Indeed, the Letter conspicuously fails even to present a fair representation of SFC's contentions as to the scope of its religious rights at issue in this case. As SFC has stated in several contexts,⁶ the Sunday Mass is one of the most historically sacred aspects of Catholic liturgy. See Sworn Statement, attached as Appendix A to SFC's July 5, 2012 Supplement. How the SFC and, indeed universally, how the Catholic Church visually presents the sacred Sunday Mass each week is a matter derivative of a history of this liturgical observance that has been

³ Id.

⁴ Because the Letter, requesting more information, is in no respect a decision, the gratuitous comments are puzzling.

⁵ Notwithstanding the primacy of the First Amendment issue, some additional data is presented. See Appendix A.

⁶ See 2012 Supplement, supra, at 2, 7, 8 and note 19.

meticulously designed and maintained by the Catholic Church for millennia. Id. A proposal by the FCC to force any alteration in SFC's telecast of its religious programming ipso facto presents a fundamental conflict with SFC's First Amendment rights to control and determine its own historic, liturgical practices. Id. Thus, the SFC's objection to closed captioning is grounded on the reasoned judgment of SFC that imposing closed captioning on the weekly telecast of the SFC's Sunday Mass would be so visually disruptive as to violate Catholic traditions, practices and teachings that are fundamental to the religion itself.⁷ Id. Indeed, former FCC Commissioner Robert Mc Dowell has raised serious questions whether closed captioning in such circumstances might be harmful or even could be practically achieved.⁸ Moreover, the guidelines of the U.S. Conference of Catholic Bishops prohibit any desecration or denigration of the solemnity of the Sunday Mass. Id. In short, any FCC mandate that SFC must impose closed captioning on its Sunday Mass telecast would violate SFC's religious right to control the visual aspect of its Sunday Mass, in violation of the First amendment to the U.S. Constitution.⁹

Contrary to the Letter's erroneous analysis of a case cited in SFC's previous Supplement, it is increasingly clear that the federal courts will protect religious rights such as those at issue here. First, SFC's citation in its 2012 Supplement to the Supreme Court's decision in Hosanna-Tabor Evangelical Lutheran Church v. EEOC, 132 S.Ct. 694 (2012), was merely to note, inter alia, Chief Justice Roberts' salient observation that the federal government may not constitutionally interfere in the sensitive internal judgments of religious groups. Indeed, SFC's threshold argument in this case is exactly that – the FCC may not constitutionally substitute its judgment for the sensitive internal judgment of a religious group, such as the SFC's judgment in this case to safeguard the historic and sacred integrity of the weekly telecast of its Sunday Mass.

⁷ See Appendix A ; see also Supplement, filed July 5, 2012 and the Petition, filed December 21, 2009.

⁸ See FCC 12-9, rel. January 13, 2012, at 111.

⁹ Such a mandate is also unjustifiable where there has been no request to SFC for such captioning. See Appendix A.

Numerous other federal court decisions sustain SFC's threshold contention that the FCC's imposition of a closed captioning mandate on SFC's Sunday Mass unconstitutionally would intrude on SFC's internal decision-making as to how its sacred and historic Sunday Mass should be visually presented. The Supreme Court long has recognized that some federal rules cannot lawfully be imposed on religious organizations. See NLRB v Catholic Bishop, 440 U.S. 490 (1979). The Supreme Court also has made it clear that the Free Exercise Clause generally shields religious groups against certain regulations. See Church of Lukumi Babalu Ave., Inc. v. City of Hialeah, 508 U.S. 520, 525 (1993). The Supreme Court also has repeatedly held that religious groups' rights extend to "religiously motivated conduct" (such as the SFC's Sunday Mass).¹⁰ Finally, courts long have protected religious groups under the Religious Freedom Restoration Act to prevent the unconstitutional deprivation of their religious freedom.¹¹

CONCLUSION

In view of the foregoing, the FCC should grant appropriate administrative relief for SFC with respect to any rule or policy that otherwise would mandate closed-captioning of its Sunday Mass telecast.

Respectfully submitted,



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December 4, 2013

¹⁰ See The Origins and Historical Understanding of Free Exercise of Religion, 103 Harvard L. Rev. 1409, 1488-89.

¹¹ See generally Hobby Lobby Stores, Inc. v. Sibelius, 723 F.3d 1114 (10th Cir. 2013) (appeal pending).

APPENDIX A

SWORN STATEMENT

My name is Louis J. Sanchez, a resident of San Antonio, Texas, and Administrator of San Fernando Cathedral of San Antonio, TX ("SFC"). This Sworn Statement is given in support of SFC's Petition for Exemption and/or Waiver, which seeks permanent relief from compliance with the FCC's closed-captioning rules, with respect to its Spanish-language broadcast of *La Santa Misa*, "Sunday Mass."

1. As I stated in my previous Sworn Statement, attached as Appendix A to the SFC's July 5, 2012 "Supplement" to the SFC's 2009 Petition to the FCC, *La Santa Misa* is telecast live by satellite each Sunday morning throughout Canada, United States and Mexico and is available weekly to millions of Catholics.
2. In my previous Sworn Statement, my leading argument in favor of relief for SFC from the FCC's closed captioning rules, as applied to broadcast of the Sunday Mass was that the unique aspect of SFC's Sunday Mass makes it particularly UNSUITABLE for closed captioning. I will not restate the details of that critical argument but, rather, simply emphasize that the FCC's imposition of a closed captioning requirement upon the SFC with respect to how it presents the Sunday Mass would unjustifiably interfere with the "historic presentation of the Mass" and would replace the Church's solemn judgment with that of the federal government, in violation of the SFC's religious rights under the US constitution and the legal judgments of the courts of the United States. There is no reasonable alternative. Moreover, as I have previously noted, the SFC's religious judgment on this matter finds broad support in specific guidelines of the U.S. Conference of Catholic Bishops, which seeks to prevent the denigration of the solemnity of the Sunday Mass, a historic, sacred and established liturgy that has served Catholics for millennia.
3. I hereby also update my report regarding the SFC's financial condition, although to grant the relief sought here by SFC, the threshold constitutional and legal arguments should preclude an FCC requirement that any of the Church's financial information even be disclosed to the FCC. That said, I can confirm that the financial situation remains such that, regrettably, the FCC's imposition of a closed captioning obligation on the weekly broadcast of the Sunday Mass would force the SFC to cancel this weekly service. Period. SFC has previously provided the FCC with sufficient financial data to explain why the government's imposition of this legal requirement would result in the termination of this important aspect of the Church's religious ministry; it should be sufficient merely for me to note that substantial deficits continue and, under present financial conditions, the SFC's Finance Council would not continue to subsidize *Las Santa Misa* -- a significant, historic and solemn outreach mission -- if the FCC were to force the SFC to undertake a closed captioning obligation regarding the Sunday Mass.
4. Finally, it also should be noted that, in more than 7 years' employment with SFC, I am unaware of even one complaint being lodged with SFC or any other entity regarding the absence of captioning or "signing" (of any sort) with respect to the broadcast of the Sunday Mass. Thus, for the government to impose such a crippling obligation on our Church, to intervene in the internal judgments of this religious group is not just unconstitutional but is unconscionable in a nation that asserts itself, among other nations, as a land of religious freedom.

I AFFIRM UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND COMPLETE TO THE BEST OF MY INFORMATION AND BELIEF. EXECUTED THIS 3RD DAY OF DECEMBER, 2013.



Louis J. Sanchez